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No. 01-455

IN THE
Supreme Court of the United States

FRANCONIA ASSOCIATES, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* COUNCIL FOR AFFORDABLE AND RURAL HOUSING IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* COUNCIL FOR AFFORDABLE AND RURAL HOUSING IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Council for Affordable and Rural Housing (CARH) is a nationwide nonprofit organization whose members collectively own and manage the majority of the Section 515 housing in the country. CARH is the leading industry voice on rural housing issues. As such, CARH serves as an advocate for its members on all issues that affect rural housing, including Section 515 housing. In addition, CARH conducts nationwide training and educational activities regarding the development and management of rural housing.

For the owners of Section 515 housing, nothing is more sacrosanct than the property rights attendant to such projects. It is the belief of CARH and its members that a taking of the property rights of Section 515 owners has been affected by the application of the Emergency Low Income Housing Preservation Act (ELIHPA) to such property rights. Therefore, if the decision below is sustained, CARH's members will be precluded from pursuing their claims for payment of just compensation for the taking of their property rights. Accordingly, CARH, on behalf of its members, has a vital interest in seeking the reversal of the decision under review.

[1] The parties have consented to the filing of this brief and the consents were filed with the Clerk of the Court contemporaneously with the filing of this brief. In accordance with Rule 37.6 of this Court, CARH states that its counsel as specified herein authored this brief in whole and no person or entity, other than CARH, or its members, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Owners of Section 515 projects have a bundle of property rights. Specifically, Section 515 owners have a fee simple interest in the projects they own. They had this interest when they entered the Section 515 Program and they have retained it throughout their participation in the Program.

The court below held that Petitioners' takings claims are barred by the applicable statute of limitations. The only property interest recognized by the court below in reaching this conclusion was the owners' contractual right to prepay their mortgages. No recognition was accorded to the fee simple property rights of Section 515 owners. In fact, the court below did not even address this fundamental property right of Section 515 owners. The lower court's failure to recognize the fee simple property interest attendant to Section 515 projects and held by the owners thereof is inconsistent with the terms of the Section 515 Program.

ARGUMENT

In the decision under review, the lower court ruled that Petitioners' taking claims accrued for purposes of 28 U.S.C. § 2501[2] on February 5, 1988, the date on which the Emergency Low Income Housing Preservation Act was enacted. A9.[3] Accordingly, the lower court held that

[2] 28 U.S.C. § 2501 states, "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

[3] "A__" refers to the Appendix filed as part of Petitioners' Petition for Writ of Certiorari. Although the decision by the lower court under review is reported at 240 F.3d 1358 (Fed. Cir. 2001), citations to that opinion are to the opinion as reproduced in the aforementioned Appendix.

Petitioners' takings claims are barred because they were filed more than six years after February 5, 1988.[4] Id.

In holding that Petitioners' taking claims are barred by the statute of limitations, the only property interest recognized and discussed by the court below was the Petitioners' contractual right to prepay the mortgages on their Section 515 projects.[5] Id. at A14. The court below failed to recognize that Petitioners' taking claims are also predicated on their State-created fee simple property interests which are the hallmark of the Section 515 Program. This failure by the court below is a serious flaw in the court's decision that requires reversal of the lower court's decision.

I. THE SECTION 515 PROGRAM

The Section 515 Program is so named because it is the program that was administered, at the time Petitioners became participants therein, by the Farmer's Home Administration ("FmHA"),[6] an agency of the Department of Agriculture, in accordance with Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485. Section 515 authorized FmHA to make direct loans to private entities for the purposes of developing privately owned rental housing in

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[4] The Appeals Court also held that Petitioners' breach of contact claims are barred by 28 U.S.C. § 2501. Although of importance to its members, CARH has decided to deal only with the takings issue in its brief because of CARH's belief that it can provide insight to relevant matters on this issue not fully addressed by the parties.

[5] Although CARH agrees that Petitioners' contractual right to prepay is a recognizable property interest subject to taking, CARH believes, as discussed herein, that Petitioners' property interests are much broader than the contractual right to prepay.

[6] FmHA is now known as the Rural Housing Service (RHS).

rural areas for persons who were of low or moderate income or who were elderly or handicapped.

The first step in becoming a participant in the Section 515 Program was the filing of a preapplication form, along with certain required information. 7 C.F.R. § 1822.91(a) (1979).[7] Part of the information required to be submitted with the preapplication form was information showing that the proposed development site was owned or under option by the applicant. Part 1822, Subpart D, Exhibit F-6 (2)c. This was consistent with the requirement that an applicant had to own the housing and related land or become the owner when the loan closed. § 1822.84(a).

If a preapplication was approved, an applicant next submitted an application along with other required information. § 1822.92(a). If the application was approved, the loan docket was processed to the stage where a construction loan would normally close prior to the start of construction. § 1822.94(a). During this process: FmHA would obligate funds for the applicant's loan, § 1822.94(a)(1); the applicant would execute the required loan agreement, § 1822.94(a)(2); and the applicant would provide evidence (1) that it had deposited the required initial operating and maintenance capital into a general fund account, § 1822.94(a)(4)[8] and (2) of the terms and final arrangements for construction financing.[9] § 1822.94(a)(5).

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[7] All references to 7 C.F.R. Part 1822 are to the January 1, 1979 edition of the Code of Federal Regulations.

[8] A Section 515 loan was limited to 95% of the development cost or of the security value of the project, whichever was less. 7 C.F.R. § 1822.86(a)(2). The other 5% to be contributed by the applicant could have been in the form of cash or land or a combination thereof. Id. However, an applicant was required to contribute initial operating capital of at least 2% of the total development cost. § 1822.84(a)(5)(i).

The next step was the construction of the project. For all loans greater than $50,000, construction financing was required to be obtained by an applicant from a private lender when such a loan was available at reasonable rates and terms. § 1822.90(d)(2) and § 1822.94(b)(1). The majority of applicants obtained their construction loans from private lenders.[10]

When private financing was obtained, FmHA would notify the construction lender of its commitment to make a loan to an applicant after completion of construction. § 1822.94(b)(1)(ii). The FmHA loan proceeds would then be used to repay the construction loan. However, FmHA would also notify the construction lender that FmHA's commitment to make the loan on behalf of the applicant was contingent upon the applicant complying with any approval conditions imposed by FmHA, acceptable performance by the builder and payment of all construction bills. Id.

The loan from FmHA to the applicant could be closed, permanent instruments issued to evidence the indebtedness to FmHA and the loan proceeds used to repay the construction lender, only when the project was substantially completed and all bills paid. § 1822.94(b)(1)(vii). To evidence the indebtedness, prescribed forms from FmHA were to be used for the mortgage and promissory note. § 1822.95(b) and § 1822.95(c)(1). The promissory note was to be dated as of the date of closing. § 1822.95(c)(2).

[9] The regulations use the term interim financing.

[10] Applicants that did not obtain their construction loans from private lenders obtained them from FmHA.

The loan was considered closed when the mortgage was filed of record. § 1822.95(e). However, it was possible for an applicant to have the loan cancelled, and a completed project used for non-Section 515 purposes, if the loan was cancelled before the loan closing. § 1822.94(e).

II. THE PROPERTY RIGHTS OF SECTION 515 OWNERS PRIOR TO ENACTMENT OF ELIHPA

As already discussed, developers desiring to build rental housing projects pursuant to FmHA's Section 515 Program were required to own the project and land on which the project was built. This ownership interest of Section 515 owners was a fee simple absolute. A fee simple absolute is the broadest property interest permitted by law and continues indefinitely. Black's Law Dictionary, 7th ed.

During their participation in the Section 515 Program, owners agreed to abide by certain conditions imposed by FmHA. For example, owners agreed: not to discriminate or permit discrimination by any of its agents in the use or occupancy of the housing, 7 C.F.R. § 1822.88(g); to rent a project's units to eligible occupants,[11] Id. at § 1822.88(h); if operating on a limited profit basis, to limit their annual return to 8 percent of an owner's initial investment, § 1822.88(k); to comply with the National Flood Insurance Act of 1968, § 1822.88(o); and to comply with Section 114 of the Clean Air Act and Section 308 of the Federal Water Pollution Control Act. § 1822.88(r)(1)(i). Owners also agreed to: establish, maintain and operate certain accounts in the manner specified by FmHA, A167-

[11] An eligible occupant was defined as a senior citizen with low or moderate income or any family with low income, or a senior citizen without regard to income or a family with low or moderate income, depending on the type of loan from FmHA. 7 C.F.R. § 1822.83(e).

170 (¶¶ 5-9); submit an annual audit of a project's books and records to FmHA, A171 (¶ 10(c)); and submit annual budgets and operating plans to FmHA. A172 (¶ 10(g)(1)).

Despite these limitations agreed to by the owners of Section 515 projects, the owners retained the right to prepay their loans. A176 ("Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower."). However, under regulations promulgated on October 27, 1980, prepayment would not be accepted unless the owner provided written notice to each tenant 60 days prior to submitting an offer to prepay. 45 Fed. Reg. 70775, 70798 (Oct. 27, 1980) (*codified at* 7 C.F.R. § 1944.250(a)(1) (1981)). The notice had to be posted within the building and include information about a possible change in ownership and any resulting changes that would occur as a result of the prepayment. Id. The District Director of FmHA reviewed the contents and procedure for tenant notification prior to approving prepayment. Id. After approval, the owner was required to provide additional written notices to tenants describing their priority rights to occupancy in other Section 515 projects if they were displaced. 7 C.F.R. § 1944.250(a)(2).[12]

III. THE PROPERTY RIGHTS OF SECTION 515 OWNERS AFTER ENACTMENT OF ELIHPA

After enactment of ELIHPA in 1988, the administrative restrictions on prepayment were increased, but prepayment without ongoing use restrictions was still possible, subject to several variables. Therefore, an owner could not know the effect of ELIHPA on its property until

[12] Approval was required if the District Director determined that an owner had complied with these tenant notification requirements.

the owner was prepared to prepay and offered to prepay its loan at a particular point in time.

Instances where prepayment is permitted without use restrictions include the following situations:

(1) RHS determines that housing opportunities for minorities would not be materially affected by the prepayment and there is adequate affordable rental housing in the area. 7 C.F.R. § 1965.215(c)(1)(iii) (2001).[13]

(2) If the loan is subject to a use restriction and its subsidy funding is terminated. Id. at § 1965.215(c)(3)(ii).[14]

(3) The project is offered for sale at market value to a qualified nonprofit entity and no bona fide offer to buy is made within 180 days, and RHS has funds to finance such a sale. § 1965.218(a).

(4) When no funds to finance a sale to a qualified nonprofit entity are available for 15 consecutive months. § 1965.218(b).

(5) Owners of Section 515 projects that receive project-based subsidies under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437f, and who have current section 8 contracts at the time of prepayment may prepay their loans if RHS determines that prepayment would not materially affect housing opportunities for minorities.

[13] All references to 7 C.F.R. Part 1965 are to the January 1, 2001 edition of the Code of Federal Regulations.

[14] A Section 515 loan made before December 22, 1979 is subject to use restrictions if a servicing action was taken by FmHA. Loans made after December 22, 1979 but before December 14, 1989 are all subject to use restrictions.

§1965.215(c)(i) and (ii).[15] The section 8 contracts need not be renewed upon their expiration after prepayment of the Section 515 loan since the current tenants would be protected against the adverse impact of higher rents through the section 8 enhanced vouchers that they would receive after project-based section 8 subsidies are terminated. See 42 U.S.C. § 1437f(t).[16]

CONCLUSION

Owners of Section 515 projects have a fee simple absolute property interest in their projects. They had this interest before they became participants in the Section 515 Program and they have retained this interest throughout their participation in the Program, notwithstanding the use limitations and other restrictions to which the owners agreed.

A fee simple absolute is the most fundamental property interest. Yet, in the decision under review, the court below did not acknowledge the existence of such an interest. Rather, in holding that Petitioners' takings claims are barred by the statute of limitations, the court below focused exclusively on the contractual right of Section 515 owners to prepay their loans.

Any analysis of when Petitioners' takings claims accrued must take into account all of the property interests taken, as alleged by Petitioners. Failure by the court below to recognize the Petitioners' fee simple property interests

[15] Approximately 10 percent of Section 515 units are in projects with section 8 subsidies.

[16] Enhanced vouchers are used to subsidize an owner's rents at market levels. Upon the expiration and nonrenewal of a project-based section 8 contract, there are no limitations on the rents an owner can charge.

constitutes an error that requires reversal of the decision under review.

In several instances the owner of a Section 515 project may prepay a project's loan. Thus, housing market conditions and the availability of appropriations for purchases by nonprofits are the two main factors that determine whether the application of ELIHPA has affected a taking of the property rights of Section 515 owners. If circumstances are such that an owner of a Section 515 project is able to prepay a project's loan without any residual restrictions, the owner has not suffered a taking. Accordingly, the takings claim of a Section 515 owner is not ripe until the owner seeks prepayment and, for whatever reason, is not permitted to prepay without limitation. The failure by the court below to recognize this fundamental concept of takings law in determining when Petitioners' takings claims accrued also constitutes reversible error. For this, and the other reasons specified herein, *amicus curiae* Council for Affordable and Rural Housing requests that the Court reverse the decision by the lower court that Petitioners' takings claims are barred by the statute of limitations.

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